Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED

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CASE AND COMMENT

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Postal Currency.

A novel, ingenious, and yet perfectly simple means of turning ordinary paper currency into a negotiable instrument that can be sent through the mails as safely as a bank draft or check is now under consideration by Congress. The plan is merely to print all bills of $5 or less, including some fractional currency, with blank spaces in which any owner of the bill can at any time fill the name and address of any person to whom he wishes to send the bill, and then by affixing thereon and canceling a two-cent stamp, and writing his own name upon the back, he has transformed a piece of the ordinary paper currency of the government into a valid draft upon the United States government, payable to the person thereon named. This makes it possible for a person in one moment to convert any $1, $2, or $5 bill into a negotiable instrument of the very best kind, that will thereafter pass only by indorsement of the proper person and be the safest possible kind of money order to send through the mails. The proposition, which has heretofore been commended in these columns, ought certainly to become a law before Congress adjourns. It does not seem possible to mention any serious objection to the measure. It makes no change in the financial policy of the government or the amount of money in circulation. It does provide for an extraordinarily convenient method of making safe remittances of small sums of money. In addition, it tends to insure a constant supply of clean bills by the reissue of a new one in place of every bill that has been turned into a draft when that is paid.

The Doctrine of "Last Clear Chance."

The origin of the doctrine of "last clear chance," which forms the subject of a note to Began *v.* Carolina C. R. Co. 55 L. R. A. 418, is generally attributed to the celebrated case of Davies *v.* Mann, 10 Mees. & W. 546. The courts and text-book writers generally refer to this case as "the Donkey Case," some because the animal that was the victim of the accident was a donkey, and others apparently because of the doctrine there promulgated. As the doctrine has been most frequently invoked by persons (their heirs or representatives) who have sought repose upon railroad tracks, or an airing upon railroad trestles, the choice of the name has been vindicated, whatever may have suggested it.

The doctrine has been accurately and felicitously stated by a writer in the Quarterly Law Review (vol. 2, p. 507) as follows: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it."

This quotation implies what is expressly stated by the North Carolina supreme court in Smith *v.* Norfolk & N. S. R. Co. 114 N. C. 729, 25 L. R. A. 287, namely, that the rule in Davies *v.* Mann simply furnishes a means of determining whether the plaintiff's negligence is a remote, or a proximate, cause of the injury. As is said in that case, before the introduction of the rule any negligence on the part of the plaintiff, which, in any degree, contributed to the accident, was judicially treated as a proximate cause which barred a recovery. The true function of the doctrine, therefore, is, not to permit a recovery in spite of contributory negligence (though the form in which it is stated in some of the cases gives it that effect), but merely to relieve the plaintiff's antecedent negligence of the character of contributory negligence. This result it accomplishes by characterizing the breach of defendant's duty, when it intervenes between the plaintiff's negligence and the accident, as the sole proximate cause of the injury, relegating the plaintiff's antecedent negligence to the position of a mere condition or remote cause, as distinguished from one of the proximate causes, of the accident, thereby (since negligence to be contributory must be one of the proximate causes) stripping plaintiff's negligence of the quality suggested by the adjective "contributory." If this view of the doctrine is correct, it is apparent that it can never be invoked for the purpose of establishing a duty on the part of the defendant, or of charging him with negligence. On the contrary, the existence of a duty and breach of duty on the part of the defendant must be established before there is any opportunity or occasion for applying the doctrine of "last clear chance." In other words, they are indispensable prerequisites of the application of the doctrine. But it may be asked: If the doctrine only operates upon a pre-existing and independently determined duty and breach of duty on defendant's part intervening between the plaintiff's negligence and the accident, and if it be conceded that, but for it, the general doctrine of contributory negligence would prevent a recovery, how is the duty on defendant's part to be established? It is at this point that difficulty and confusion often arise. The courts frequently, because of the failure to observe the distinction between the *nonliability* and the *non-negligence* of the defendant, conceive that in order to establish a duty on the part of the defendant to a person who, under the general unqualified doctrine of contributory negligence, would be chargeable with such negligence, it is necessary to clear that doctrine out of the way. And sometimes the doctrine of "last clear chance" itself has apparently been invoked for the purpose. This is, of course, merely to argue in a circle. In Pickett *v.* Wilmington, 117 N. C. 616, 30 L. R. A. 257, where the doctrine of "last clear chance" was applied so as to hold a railroad company liable for killing a drunken trespasser lying on the track, although the employees in charge of the train did not actually see him in time to avoid the accident, it appearing that they might have seen him if they had kept a proper lookout, the North Carolina supreme court appreciated the necessity of establishing a duty on the part of the railroad company to keep a lookout, independently of the doctrine of "last clear chance," before that doctrine could be applied; but evidently thought that the doctrine of contributory negligence must, in some way, be avoided or evaded before the defendant could be charged with negligence in failing to keep a lookout; and to accomplish that result, it adopted the view that the company owed to passengers on the train, and to trespassers on the track, not chargeable with negligence, the duty to keep a lookout, and that if that duty had been performed, though it was not primarily owed to the trespasser in question because of his negligence, he would nevertheless have been discovered, and the company would have had the last clear chance to avoid the accident. The obvious objection to this theory is that it indirectly allows one person to avail himself of a breach of duty owed to another, and not to himself, and, thus, offends one of the fundamental principles of the law of negligence. But these efforts to avoid the effect of contributory negligence in order to establish a duty on defendant's part are entirely unnecessary, and proceed from the failure to keep in mind the mode in which the doctrine of contributory negligence operates. That doctrine does not in the least affect the question of the *duty* that the defendant owes to the plaintiff, though it may affect the question of his *liability* to the latter. It has no function to perform until the existence of the duty and its breach have been estab-

lished. The existence of the duty, therefore, and the class of persons to whom it is owed, must be determined without reference to the question of contributory negligence upon the part of members of such class. After it has been established that the plaintiff was a member of the class to whom the duty was owed, and that there was a breach of such duty, the doctrine of contributory negligence may be invoked. It does not, however, operate at all to purge the defendant of its breach of duty, or to eliminate the plaintiff from the class of persons to whom that duty was owed. On the contrary, it assumes that the defendant has been guilty of a breach of duty toward the *plaintiff*. If, however, the plaintiff's own negligence proximately contributed to the injury, the courts (except in admiralty cases and in a few states where the doctrine of comparative negligence obtains) refuse either to place the entire responsibility on the defendant (which would be manifestly unjust), or to apportion the responsibility between the parties (which is supposed to be impracticable). It is therefore misleading and improper to separate injured persons into two classes, one embracing those who, under the general doctrine, would be guilty of, and the other those who would be free from, contributory negligence, and inquire as to the duty owed to each class separately. The *duty* owed to each class is exactly the same, though the *liability* may be different. The distinction is often unimportant, but is vital to the doctrine of "last clear chance." It is not intended to deny here that many of the facts affecting the question of plaintiff's contributory negligence may also affect the question of defendant's duty to him, nor even to deny that the question of contributory negligence may be determined by exactly the same criterion as the question of defendant's duty. For instance, it may be held that an adult who trespasses upon a railroad track is guilty of contributory negligence (or would be if the railroad company were held to be negligent), and also that the company owes no duty to keep a lookout for adult trespassers because it has the right to assume that they will keep off the track, while at the same time it is held that the company owes a duty to keep a lookout for children trespassing on the track, and that such children are not guilty of contributory negligence, thus making age and capacity the criteria both of negligence and contributory negligence. But even in such a case the question of the company's duty, though it has been determined by the same facts that determine the existence or nonexistence of contributory negligence, has not been determined, nor in the least affected, by the doctrine of contributory negligence itself. If in the case supposed the doctrine of contributory negligence were to be ignored altogether (and the doctrine after all is only one of expediency, and is not fundamental), the company would still be exonerated from any duty to the adult trespasser, and for that reason the latter would be unable to recover; and, on the other hand, if it were to be held that the company owed no duty to keep a lookout for a child on the track, the latter's freedom from contributory negligence would not enable him to recover.

In order to give full force and effect, upon the preliminary question of the defendant's duty toward plaintiff (the establishment of which is a prerequisite of the doctrine of "last clear chance"), to the facts that may also happen to affect the question of plaintiff's contributory negligence, and at the same time to avoid confusing the two questions, the following test is suggested: Would the defendant be liable to a person in exactly the same situation, and sustaining exactly the same relation to him in every respect, as the plaintiff, except that such person would not, while the plaintiff would, be chargeable with contributory negligence under the general unqualified doctrine of contributory negligence? If the answer to this question is in the negative, that is the end of the case, and no occasion or opportunity has arisen for the application of the general doctrine of contributory negligence, or its qualification, the doctrine of "last clear chance." If, however, the answer is in the affirmative, the duty on the part of the defendant has been established, and, since it is assumed that the plaintiff, under the general unqualified doctrine of contributory negligence, would be chargeable with such negligence, the doctrine of "last clear chance" must be invoked (assuming that the gravamen of the action is negligence, and not wilfulness) so as to take the case out of the doctrine of contributory negligence,—in other words, the doctrine of "last clear chance" must be invoked, so that the court will not be confronted with a situation in which it will

say that, both the negligence of the plaintiff and that of the defendant having been proximate causes of the accident, it will not undertake to apportion the responsibility. If the duty incumbent on the defendant, which has thus been established without reference either to the doctrine of contributory negligence or that of "last clear chance," is one, the breach of which intervenes after the plaintiff's negligence has expended itself, all of the requisites essential to the doctrine of "last clear chance" are present, and the court is confronted with the necessity of either adopting or rejecting that doctrine.

Since, as already stated, the doctrine merely furnishes a means of determining whether or not the plaintiff's negligence is one of the proximate causes of the accident, and operates by characterizing the defendant's breach of duty, when it intervenes between the plaintiff's negligence and the accident, as the sole proximate cause, it would seem that the degree of defendant's negligence, unless it amounted to wantonness or wilfulness, would make no difference in the application of the doctrine, except, perhaps, in the few jurisdictions where the doctrine of comparative negligence obtains. Therefore, if the court in an action, the gravamen of which is negligence, holds that the doctrine applies when the defendant actually discovered the plaintiff's peril, there seems to be no logical reason for denying its applicability when the defendant did not discover the peril *if it was his duty to have discovered it*. But, while the courts are substantially agreed that the defendant is liable notwithstanding the plaintiff's antecedent negligence, if he (defendant) failed to exercise due care after discovering plaintiff's peril, there is apparently less harmony among the decisions when it is attempted to hold the defendant liable because of his failure to discover the peril. Many of the decisions, however, that hold the defendant *liable* in the former case, do not rest upon the doctrine of "last clear chance," but upon the ground that the failure to exercise due care to prevent the accident after discovering the peril amounts to wilfulness or wantonness, against which contributory negligence is never a defense. On the other hand, many of the cases that *deny* the defendant's liability when the peril was not discovered, are really decided upon the ground that there was no duty on the defendant's part to discover the peril. Such cases do not involve a denial of the applicability of the doctrine of "last clear chance" to an omission of a duty to discover the peril, since under the holding of the court, there *was* no duty in the premises, and, therefore, no basis for holding the defendant liable, even if the doctrine of contributory negligence were to be eliminated. By paying proper attention to the distinction just suggested, many of the cases upon the question as to a railroad company's liability for injuries to trespassers on the track who were chargeable with negligence in the first instance in getting into a position of peril, and who might have been, but were not actually, seen in time to avoid the accident, though diametrically opposed so far as concerns the ultimate conclusions reached as to the company's liability, may be reconciled so far as the doctrine of "last clear chance" is concerned. Many of the cases that deny the company's liability under such circumstances do so upon the ground that there was no duty on the part of the company to keep a lookout for trespassers, while the cases that hold the company liable, notwithstanding the trespasser's antecedent negligence, take the view that the company was bound to keep a lookout for trespassers, including the trespasser in question, and then, by applying the doctrine of "last clear chance," avoid the effect of the doctrine of contributory negligence. Some of the cases that hold that the company is liable to keep a lookout for trespassers, and yet deny its liability, may be reconciled with the doctrine of "last clear chance" because they rest upon the ground that, even if the trespasser had been seen in a place of danger, the engineer would have had the right to assume that he would get off the track in time to avoid the accident. Here, too, there is no opportunity or occasion for applying the doctrine, and therefore no denial of its applicability to an omission of a duty to discover the peril, because the engineer would not have been chargeable with negligence in acting as he did, even if he had performed his duty to keep a lookout and had discovered the peril, and, therefore, the company would not have been liable even if the trespasser had been entirely free from negligence.

It must be admitted that the doctrine of "last clear chance," in the view of it here suggested, leaves for the solution of the

court, without any assistance from it, a difficult question, namely, the duty of the defendant in the premises; but that is exactly the same question that the court would have to answer before it could hold the defendant liable if the plaintiff were not chargeable with contributory negligence, even under the unqualified doctrine, or if that doctrine were to be repudiated altogether.

As has already been suggested, in order that there may be an occasion or opportunity for the application of the doctrine of "last clear chance,"—or, at least, in order that it may be applied favorably to the plaintiff,—the defendant's breach of duty must have intervened between the plaintiff's negligence and the accident. To make such a condition possible, it is obvious that the plaintiff's negligence must have ceased at some time before the defendant's. By paying proper attention to this element, some of the cases that, at first impression, seem to involve a denial of the doctrine of "last clear chance" may be reconciled with it. For instance, it is obvious that in many cases where the person injured was walking along a railroad track, or crossing the track at a highway crossing, he could, by the exercise of due care, have seen the approaching train and stepped from the track into a place of safety after the train had reached a point at which any effort on the part of the engineer to prevent the accident would have been ineffectual. If it be conceded that the engineer was guilty of negligence in failing sooner to discover the peril, so was the person injured, and it would seem that the latter, if he had used due care, would have had the last clear chance to avoid the accident. In the view most favorable to him, his negligence would be, at least, concurrent with that of the defendant up to the last instant at which the accident could have been avoided, and therefore the indispensable condition of an act of negligence on the defendant's part, intervening between the negligence of the injured person and the accident, is lacking. In many cases in which the conditions have been like those in the case supposed, the courts have applied the doctrine of contributory negligence upon the assumption that the negligence of both parties was concurrent, without alluding to the doctrine of "last clear chance," or attempting to apply that doctrine in favor of the defendant. While it would not have affected the result at all, it would have promoted clearness if the courts in such cases had either expressed their disapproval of the doctrine, if they *did* disapprove of it, or shown that, in the particular case, it did not apply because the negligence of both parties was concurrent, or that it applied against, and not in favor of, the plaintiff because he had the last clear chance. Some of the courts that have adopted the doctrine seem to have paid too little attention to this element of it. By devoting their attention to the existence of the other necessary element, namely, the existence of a duty and breach of duty on defendant's part after the plaintiff's negligence had commenced, to the exclusion of the question whether plaintiff's negligence continued until the very instant of the accident, or at least as long as the defendant's, they have been led to apply the doctrine so as to hold the defendant liable in cases where it would seem that the plaintiff, rather than the defendant, had the last clear chance to avoid the accident. There is some conflict among the courts which recognize the importance of this element, as to the circumstances under which the plaintiff's negligence may be regarded as having ceased before the accident. In North Carolina, for instance, it is now held that where a drunken trespasser lies down upon the railroad track his negligence is not to be regarded as continuing up to the instant he is struck by the train, but as culminating at the time he lies down on the track and loses consciousness, while in Texas, if the unconsciousness of the trespasser is due to intoxication, his negligence is regarded as continuing, but if it is due to a sudden paroxysm of disease, it is not so regarded. (Houston R. Co. *v.* Sympkins, 54 Tex. 615.)

When the doctrine is strictly confined to cases which present both of the elements here insisted upon, namely, the existence of a duty and breach of duty on the defendant's part after the commencement of plaintiff's negligence, and the culmination or cessation of plaintiff's negligence before the defendant's, it will be observed that the criticism that is often passed upon the doctrine, that it in effect abrogates the doctrine of contributory negligence, is too sweeping. It is true that the doctrine, in a certain class of cases, operates to make the liability of the defendant the same, whether the perilous position of the person injured was

due to his original negligence or not; but in the nature of things, the cases in which the negligence of the person injured may be regarded as having culminated and terminated before the defendant's, are of comparatively rare occurrence. Again, the doctrine of "last clear chance" leaves open to the doctrine of contributory negligence the entire field covered by cases in which the negligence of the plaintiff intervenes after the negligence of the defendant, as, for example, where the negligence charged against a railroad company consists of the failure to give the proper signals on approaching a highway crossing, and the person injured went upon the track after the train had passed the point at which the signals should have been given.

There is a decided tendency on the part of the courts to apply the doctrine of "last clear chance," as herein defined and limited, to all omissions of duty on the defendant's part intervening between the plaintiff's negligence and the accident, whether those omissions of duty occurred before or after the discovery of plaintiff's peril, and for reasons already stated, there is apparently no logical reason why it should not be so applied, if adopted at all.

In concluding, Mr. Kipling's version of the remarks addressed by Noah, while persuading the prototype of Mr. Davies' donkey to enter the ark, seems appropriate:

"Divil take the ass that bred you,
And the greater ass that fed you."

Index to New Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 54, Parts 5 and 6.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with CASE AND COMMENT for one year for $1.

Among the New Decisions.

Adverse Possession.

An agent's occupancy of a house on his principal's property, as a part merely of the contract for services, is held, in Davis *v.* Williams (Ala.) 54 L. R. A. 749, not to establish the relation of tenant and landlord between him and the principal, so as to pre-

the defendant. While it would not have perilous position of the person injured was

clude him from acquiring an adverse title to the property.

Aliens.

See DEATH.

Attorneys' Fees.

That the fund reached by a general creditor's bill against an insolvent building and loan association is all absorbed by prior claims not secured by mortgage or other fixed lien, so that the one who has instigated it will receive nothing, is held, in Campbell v. Providence Sav. & L. Soc. (Tenn.) 54 L. R. A. 817, not to prevent the allowance of a reasonable attorney's fee to his solicitors out of the fund.

Benefit Societies.

A requirement of the constitution of a mutual benefit society, that its privileges shall be limited to members of a specified religious denomination, is held, in Franta v. Bohemian Roman Cath. C. U. (Mo.) 54 L. R. A. 723, not to violate a provision of the state Constitution as to religious liberty.

One who joins a mutual benefit society whose by-laws provide that no one can be a member of it who is a member of a society not approved by a particular church is held, in Mazurkiewicz v. St. Adelbertus Soc. (Mich.) 54 L. R. A. 727, to have no right to complain if he is expelled from the society for membership in a society prohibited by such church.

Bills and Notes.

A payee of a promissory note, who sells it to an innocent third person, and afterwards repurchases it for value, is held, in Andrews v. Robertson (Wis.) 54 L. R. A. 673, to have no better right as against the maker than he possessed in the first instance.

Bonds.

The failure to require an agent to make weekly reports of a business transacted by him, as stipulated in the terms of the agency contract, to secure the faithful performance of which a bond was given, is held, in Fidelity Mut. L. Asso. v. Dewey (Minn.) 54 L. R. A. 945, to be such a material departure from the contract as will release and discharge the sureties from liability on the bond.

Breach of Prison.

See ESCAPE.

Carriers.

An assault by a street-car conductor on a passenger because the latter, after being carried past his station, in order to stop the car pulled the bell rope so hard that he broke it, and jerked the conductor several feet along the car floor, is held, in Birmingham R. & E. Co. v. Baird (Ala.) 54 L. R. A. 752, to render the company liable.

The ejection from a train of one who, without right and while in a drunken and helpless condition, has boarded at night a train standing in a cut, by trainmen who know that a passenger train will soon pass through the cut, is held in Waldron v. Louisville & N. R. Co. (Ky.) 54 L. R. A. 919, to render the company liable for injuries by the latter train.

A carrier who, having engaged to transport imported goods in bond, pays the duties and takes the goods out of bond without authority, is held, in Smith Bros. Co. v. New Orleans & N. E. R. Co. (La.) 54 L. R. A. 923, to be liable for the damages caused thereby.

Permitting a drunken passenger who has been removed from a street car for turbulence and an assault upon a fellow passenger, to return to and remain upon the car although his turbulence continues, is held, in United Railways & E. Co. v. State, Deane (Md.) 54 L. R. A. 942, to render the street-car company liable for injuries inflicted by him upon a passenger.

A railway company which permits a drunken passenger to dance and stagger near the door of a baggage car is held, in Wheeler v. Grand Trunk R. Co. (N. H.) 54 L. R. A. 955, to be liable for injuries caused by his falling from the car.

Constitutional Law.

A statute prohibiting the letting of public printing to papers which have been established less than a year is held, in Van Harlingen v. Doyle (Cal.) 54 L. R. A. 771,

to violate constitutional provisions that all laws of a general nature shall have a uniform operation, and that no citizen shall be granted privileges which upon the same terms shall not be granted to all citizens.

Making the mere possession of a lottery ticket a misdemeanor is held, in *Ex parte* McClain (Cal.) 54 L. R. A. 779, to be within the power of a municipal corporation, where, by the Constitution, it has authority to make and enforce such by-laws and other regulations as are not in conflict with general laws.

A statute making it unlawful to herd or graze sheep within two miles of an inhabited dwelling is held, in Sifers *v.* Johnson (Idaho) 54 L. R. A. 785, to be a valid exercise of the police power of the state, and not unconstitutional.

A statute making railroad companies liable to all employees for injuries caused by negligence of any of their servants in charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train, is held, in Indianapolis Union R. Co. *v.* Houlihan (Ind.) 54 L. R. A. 787, to be constitutional as an exercise of the police power.

A restriction of the number of persons which lodging-house keepers may permit to occupy one room during the same night is held, in Bailey *v.* People (Ill.) 54 L. R. A. 838, to be a deprivation of property without due process of law, because of the discrimination in limiting the provision to lodging-house keepers.

Death.

Under a statute giving a right of action for wrongful death, to the next of kin of deceased if dependent on him for support, it is held, in Mulhall *v.* Fallon (Mass.) 54 L. R. A. 934, that an action may be brought by a nonresident alien for the negligent killing of her son.

Eminent Domain.

The condemnation of land for a public wharf is held, in Diamond Jo Line Steamers *v.* Davenport (Ia.) 54 L. R. A. 859, not to be prevented by the fact that it is already in use by a common carrier as a landing place in connection with its business as such carrier.

Escape.

Breaking a prison is held, in State *v.* King (Ia.) 54 L. R. A. 853, not to be effected by a prisoner's concealing himself in a crevice in a stone quarry to which he has been taken to work, until the guards withdraw, and then walking forth without impediment, although to aid the concealment a cover is placed over the crevice, which is removed when the escape is effected.

Forgery.

The alteration of a memorandum as to the grade of grain, indorsed on the back of an elevator receipt given by a railroad company for grain to be stored and shipped, is held, in State *v.* Hendry (Ind.) 54 L. R. A. 794, not to constitute forgery, since the memorandum is not part of the receipt, and the alteration does not change the legal effect of the receipt.

Gas.

A gas company required by statute to furnish gas to all persons within a certain distance of its mains is held, in Smith *v.* Capital Gas Co. (Cal.) 54 L. R. A. 769, to have the right to refuse to do so unless the customer agrees to pay a reasonable rent for a meter, where the value of gas required by him will not amount to one sixth of such rent.

Homicide.

In the absence of actual malice, manslaughter, and not murder, is held, in State *v.* Yanz (Conn.) 54 L. R. A. 780, to be committed by killing a man while reasonably believing from the circumstances that he is in the act of adultery with assailant's wife, although the assailant is in fact mistaken.

Insurance.

See also LIMITATION OF ACTIONS.

The recovery for loss of prospective earnings, awarded because of injury to a vessel by collision, is held, in Mason *v.* Marine Ins. Co. (C. C. A. 6th C.) 54 L. R. A. 700, to be within the rule entitling an insurer who has received an abandonment of the vessel to the fund recovered on account of

the collision from the vessel in fault; and the fact that the insurance did not cover the full value of the injured vessel will not require the insurer to share such recovery with the owner.

The temporary absence of a competent watchman regularly employed for a mill, during which the mill is destroyed by fire, is held in McGannon v. Michigan Millers' Mut. F. Ins. Co. (Mich.) 54 L. R. A. 739, not to avoid a policy of insurance on the property, which stipulates that statements in the application shall be a part of the contract, although in the application the insured agrees to keep a watchman on the premises at such times as that when the fire occurs.

Recovery on a policy insuring against sickness, which limits liability to the period when insured is continuously confined to his house and subject to the personal calls of a registered physician in good standing, is held, in Hoffman v. Michigan Home & H. Asso. (Mich.) 54 L. R. A. 746, not to be defeated by the fact that the insured went out by direction of his physician for an occasional and necessary airing, if, by reason of his illness, he was continuously confined to the house for a large portion of the time.

An illegitimate child is held, in Lavigne v. Ligue Des Patriotes (Mass.) 54 L. R. A. 814, not to be a child or relative of her father, as those words are used in a statute designating the persons who may be beneficiaries in certificates of mutual benefit associations.

An agent who secures an application for insurance at a time when he has not complied with the statute prohibiting, under penalty, the soliciting of insurance without a license, is held, in Black v. Security Mut. L. Asso. (Me.) 54 L. R. A. 939, not to be entitled to recover commissions thereon, although the policies are not issued until after the license is procured, and the statute does not expressly prevent recovery of the commissions.

Judgment.

A man's heirs at law are held, in Tyler v. Aspinwall (Conn.) 54 L. R. A. 758, to have no right to maintain a suit to set aside a fraudulent divorce, from a third person, of a woman whom he afterwards attempted to marry, for the purpose of defeating her claims upon his estate, where they were not parties to the divorce proceedings and had no interest therein.

Payment of part of a judgment by a third person for the benefit of the debtor is held, in Marshall v. Bullard (Ia.) 54 L. R. A. 862, to be a sufficient consideration for a release of the entire judgment.

Judicial Sale.

See RELEASE.

Libel.

In the absence of anything to show ill will or malice, it is held, in Cherry v. Des Moines Leader (Ia.) 54 L. R. A. 855, that a verdict must be directed for defendant in an action for the publication in a newspaper of an article ridiculing, in exaggerated and uncomplimentary terms, a public entertainment which is not only childish, but ridiculous in the extreme.

Libelous words in a pleading, which are entirely foreign to the issues, and not pertinent to the subject of the controversy, are held, in Grant v. Hayne (La.) 54 L. R. A. 930, not to be within the rule protecting averments in judicial proceedings as privileged.

Limitation of Actions.

The substitution of plaintiff as administrator with the will annexed after the filing and probate of the will, for himself as simple administrator, in an action on an insurance policy, is held, in Fidelity & C. Co. v. Freeman (C. C. A. 6th C.) 54 L. R. A. 680, not to constitute a new action so as to give the insurer the benefit of the expiration of the time limited for the bringing of the suit, which occurs before the substitution is made.

An action by a father to recover damages for the seduction of his daughter is held, in Hutcherson v. Durden (Ga.) 54 L. R. A. 811, to be barred by the statute of limitations unless brought within two years from the time the right of action accrued.

Master and Servant.

See also CONSTITUTIONAL LAW.

A foreman of water supply of a railroad, whose duty requires him to be carried from

place to place along the road, is held, in Louisville & N. R. Co. v. Stuber (C. C. A. 6th C.) 54 L. R. A. 696, when riding on a detached engine to a place where machinery needs repairing, to be a fellow servant of the engineer.

An assault and battery inflicted by a station agent and another upon a third person is held, in Lynch v. Florida Cent. & P. R. Co. (Ga.) 54 L. R. A. 810, not to render the railroad company liable for damages, when it appears that the difficulty arose out of a personal quarrel, and that the agent was acting upon his individual responsibility.

Municipal Corporations.

Failure of a municipality to attempt to enforce its ordinance limiting the speed at which bicycles may be ridden on its streets is held, in Hagerstown v. Klotz (Md.) 54 L. R. A. 940, to render it liable for injuries to a pedestrian knocked down by a bicycle which is being ridden at an immoderate rate of speed.

An ordinance providing that no vehicle which, together with its load, weighs more than 2,000 pounds, and which has tires less than 6 inches in width, shall pass or enter upon any park or parkway, is held, in State v. Rohart (Minn.) 54 L. R. A. 947, to be void as applicable to a parkway.

Negligence.

Failure to exercise ordinary care on the part of the person injured, before the negligence complained of is apparent or should have been reasonably apprehended, is held, in Western & A. R. Co. v. Ferguson (Ga.) 54 L. R. A. 802, not to preclude a recovery, but to authorize the jury to diminish the damages in proportion to the fault attributable to the person injured.

A merchant who fills a jug with gasoline for a customer, without complying with the statute providing that no gasoline shall be sold unless the package containing it is marked "gasoline," is held, in Ives v. Welden (Ia.) 54 L. R. A. 854, to be liable for injuries to a member of the customer's family by its explosion when she attempts to use it believing it to be kerosene.

New Trial.

Remarks of the solicitor general in a criminal proceeding, calculated to prejudice the jury, and not authorized by the evidence or any fair deduction therefrom, are held, in Ivey v. State (Ga.) 54 L. R. A. 959, to require the reversal of the judgment and the granting of a new trial, where the counsel for the accused objects to such remarks and moves the court to declare a mistrial.

Nuisance.

The fact that all places where intoxicating liquors are sold are declared by statute to be nuisances is held, in State v. Stark (Kan.) 54 L. R. A. 910, not to justify their abatement by any person or persons without process of law.

Principal and Surety.

See BONDS.

Release.

A sale of a section of a railroad, under a decree of court, separate from the franchise, is held, in Connor v. Tennessee Cent. R. Co. (C. C. A. 6th C.) 54 L. R. A. 687, not to be warranted for the purpose of enforcing a contractor's lien.

Seduction.

See LIMITATION OF ACTIONS.

Subrogation.

See INSURANCE.

Taxes.

An armory "owned" and occupied by any command of the volunteer military forces of the state is held, in Board of Trustees of Gate City Guards v. Atlanta (Ga.) 54 L. R. A. 806, not to be public property within the meaning of the constitutional provision authorizing the exemption from taxation of all public property; and a statute declaring that it shall be to all intents and purposes public property, and exempt from taxation, is held to be void.

A farmer who, to give his children school facilities, takes a house in town in which he places some of his household effects and lives with his family, is held, in Montgomery v. Lebanon (Ky.) 54 L. R. A. 914, not to be subject to taxation there, where he

keeps his country house at all times in readiness to receive the family, and performs his duties as a citizen where his country house is located, claiming that as his home.

Telegraph Companies.

A telegraph company is held, in Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto (C. C. A. 9th C.) 54 L. R. A. 711, to be liable for losses caused by a false telegram wilfully transmitted by an operator employed in its office, directing a bank to pay money on account of a correspondent bank.

Mental anguish resulting from failure to promptly deliver a telegram is held, in Western U. Teleg. Co. v. Ferguson (Ind.) 54 L. R. A. 846, not to be sufficient to support an action against the telegraph company for such failure.

Trial.

The conviction of a person of a crime which the Constitution requires shall be tried by a jury of twelve, though nine jurors concurring might render a verdict, is held, in State v. Ned (La.) 54 L. R. A. 933, not to be a legal conviction, though twelve jurors were physicially present during the trial, and all concurred in a verdict of guilty, if one of the jurors was in a drunken condition during the trial.

Vaccination.

Power to make vaccination a condition to admission to the schools is held, in Mathews v. Board of Edu. of School Dist. No. 1 (Mich.) 54 L. R. A. 736, not to be conferred by statutory authority to make suitable rules and regulations for their government and management, and to determine the qualifications for admission thereto, where the children are in good health and there is no smallpox in the town, although there are some cases in other parts of the state.

Warehousemen.

A warehouseman to whom are delivered spirits in defective casks, is held, in Taussig v. Bode (Cal.) 54 L. R. A. 774, to be under no obligation to exercise any care to discover and cure the defect or prevent loss by leakage, where by the storage contract the risk of loss by leakage is placed on the owner of the spirits.

New Books.

"The American Law of Real Property." By Emory Washburn. Edited and Annotated by John Wurtz. Sixth Ed. (Little, Brown & Co., Boston, Mass.) 3 Vols. $18.

"A Treatise on Guaranty Insurance." By Thomas Gold Frost. (Little, Brown & Co.) 1 Vol. $5.

"A Treatise on the Law Relative to Merchant Ships and Seamen." By Charles, Lord Tenterden. 14th Ed. by J. P. Aspinwall, B. Aspinwall, and H. S. Moore. (Little, Brown & Co., Boston, Mass.) 2 Vols. $20.

"Vol. 178 Massachusetts Reports." $2.

"Wait's Law and Practice." Seventh Ed. Edited by Edwin Baylies. (Matthew Bender, Albany, N. Y.) 3 Vols. $6.35 per Vol.

"Indiana Corporation Laws Annotated." (Bowen-Merrill Co., Indianapolis, Ind.) 1 Vol. $4.50.

"A Manual Relating to the Preparation of Wills." With an Appendix of Forms. A Book of Massachusetts Law. By George F. Tucker. Second Ed. (George B. Reed, Boston, Mass.) 1 Vol. $3.50.

Recent Articles in Law Journals and Reviews.

"Gifts for a Noncharitable Purpose."—15 Harvard Law Review, 509.

"Summary Abatement of Nuisances by Boards of Health."—2 Columbia Law Review, 203.

"Liability of a Bank to the Maker of a Check for the Wrongful Dishonor Thereof."—2 Columbia Law Review, 193.

"The Case against Jury Trials in Civil Actions."—54 Central Law Journal, 243.

"The Criticism of Courts."—10 American Lawyer, 111.

"The Ancillary Jurisdiction of Federal Courts of Equity."—10 American Lawyer, 106.

"Maintenance of a Public Nuisance."—10 American Lawyer, 99.

"Replevying Portion of Mingled Goods."—10 American Lawyer, 99.

"Donationes Mortis Causa."—112 Law Times, 492.

"Liability of Owners of Vessels for Torts of Mate and Injuries Inflicted on Roustabouts."—54 Central Law Journal, 264.

"Power to Restrain False and Malicious Publications Injurious to Property and Business."—64 Albany Law Journal, 86.

"War Revenue Act; Federal Stamp Taxes."—64 Albany Law Journal, 78.

"As to Who May Offer and Accept Rewards."—54 Central Law Journal, 184.

"Labor's Right to Persuade."—4 Brief of Phi Delta Phi, 24.

"Railway Reorganizations."—4 Brief of Phi Delta Phi, 1.

"Enforcement of Contract Valid where Made, but Contrary to the Public Policy of the State of the Forum."—54 Central Law Journal, 223.

"Taxation in the Philippines. II."—17 Political Science Quarterly, 125.

"Trusts, Their Uses and Abuses."—54 Central Law Journal, 205.

"The Proposed United States Penal Code. Report of the New York City Bar Association."—10 American Lawyer, 54.

"Authority of Bank Cashier to Bind Bank."—10 American Lawyer, 52.

"Liability of a Physician for Refusal to Attend a Patient."—10 American Lawyer, 21.

"Absence of Judge during Portion of Trial as Constituting Reversible Error."—10 American Lawyer, 50.

"Injuries in the Family Relations. Actions by Husband and Wife."—54 Central Law Journal, 164.

"The Relations of Diplomacy to the Development of International Law."—5 Law Notes, 227.

"Venue in Federal Courts against Non-resident Corporations."—5 Law Notes, 224.

"Corporations."—11 Yale Law Journal, 224.

"Incorporation by Reference."—2 Columbia Law Review, 148.

"Criminal Law and Its Administration in the State of New York."—2 Columbia Law Review, 144.

"The History of the Law of Nature. A Preliminary Study. II."—2 Columbia Law Review, 131.

"The Duties and Responsibilities of the American Lawyer in the Twentieth Century."—1 Southern Law Review, 717.

"As to Who May Offer and Accept Rewards."—54 Central Law Journal, 184.

"Some Observations on the Doctrine of Proximate Cause."—15 Harvard Law Review, 541.

"Unwritten Constitutions in the United States."—15 Harvard Law Review, 531.

The Humorous Side.

CAT TAILS IN CHURCH AND IN COURT.—A Virginia correspondent tells us the following incident: During some enthusiastic revival services near Lynchburg when matters approached a climax, a young preacher was describing the hereafter in graphic terms. After talking about the realms of bliss he referred to the fate of the impenitent, and vainly sought for imagery to describe it. Impulsively and impressively he exclaimed: "To what shall I liken this awful consuming wrath? My brethren, if you will take two cats and tie their tails together and hang them over a clothes line, you will then get some idea of the awful wrath of God." The hushed silence was broken by an explosion from a lusty youth on the front row whose sense of the ridiculous was too much for the proprieties of the occasion. It broke up the meeting. The result was that he was arraigned next day on a charge of disturbing public worship, and was obliged to contribute $10 and costs for his offense against the peace and dignity of the commonwealth of Virginia.

TRUSTING THE HONOR OF THE PROFESSION.—Mr. X, an attorney whose reputation for paying his debts was yet to be made, employed Judge Y, a neighboring lawyer, to assist him in a certain case, and when the matter was ended paid him for his services by executing a promissory note for the amount. Judge Y took the note with as good grace as possible, expecting that he would probably "always have something coming." But before the note came due he thought it prudent to see if he could sell it for something to a note broker. The broker refused to take it at 50 per cent discount, or even at any price, so Judge Y resignedly laid it away in his desk. But on the day the note matured the maker appeared and said, "Why, Judge, I have been to the bank to pay that note and it isn't there. I have the money here and want to pay it." "In the bank," said the judge with great dignity. It is here in my safe. Do you suppose, Mr. X, that I would put the note of a brother attorney in the bank?"